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Rustam Atadjanov

Humanness as a Protected Legal Interest of Crimes Against Humanity

Conceptual and Normative Aspects



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*Dedicated to my beloved wife Galina
and our amazing miracles Samira and Malik*

Foreword

This splendid book began in December 2013, over a cup of tea at my friend Rustam Atadjanov’s apartment in Tashkent. At the time, both of us were legal advisers at the ICRC Regional Delegation in Central Asia, I just defended my Dr. iur. thesis on the crime of aggression in international criminal law (ICL),¹ and Rustam was contemplating a doctorate. As we were discussing gaps in ICL, in search for a possible thesis topic for Rustam, there emerged a number of questions: what exactly is this “humanity” against which “crimes against humanity” are directed? Why include a philosophical notion in a central concept of ICL, which must be sufficiently specific, by virtue of the principles of legality and legal certainty? What to do about the multiplicity of meanings of the word “humanity”? Which of those distinct meanings is implied in the concept of crimes against humanity? Why did the authors of the term not opt for an alternative, more “measurable” term—for example, “crimes against the civilian population”? What is the relationship between “crimes against humanity” and “the laws of humanity” referred to in the Martens Clause? As the discussion progressed, it became quite clear that Rustam did identify a topic for his future thesis. Next year, both of us left the ICRC, with an interval of four months: I assumed my academic position at KIMEP University in Almaty, and Rustam embarked, with his natural curiosity and hard-working attitude, on a challenging academic journey, which would result in this book.

Despite that the *concept* of crimes against humanity is now firmly rooted in ICL, its precise *content* still begs fine-tuning. Unlike the concept of genocide, which remained virtually unchanged since the adoption of the Genocide Convention in 1948,² the notion of crimes against humanity has been continually developing since

¹ Sayapin S (2014) *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State*. T.M.C. Asser Press, The Hague.

² Schabas W (2009) *Genocide in International Law: The Crime of Crimes*, 2nd edn. Cambridge University Press, Cambridge; Sayapin S (2009) Raphael Lemkin: A Tribute EJIL 20:1157–1162.

after the end of World War II. The definitions of crimes against humanity were not identical already in the Charters of the Nuremberg and Tokyo Tribunals,³ and the Control Council Law No. 10 constituted another departure from both previous definitions.⁴ In turn, the definitions of crimes against humanity, which were included in the Statutes of the International Criminal Tribunals for the Former Yugoslavia⁵ and Rwanda,⁶ were quite different, with due regard to the circumstances of the respective armed conflicts. An attempt was made to converge the most essential elements of crimes against humanity in Article 7(1) of the Rome Statute of the International Criminal Court (ICC) but even that definition could not be regarded as complete from the point of view of the principle of legal certainty.⁷ After the adoption of the Rome Statute, a group of ICL experts embarked on the development of a Draft Convention on Crimes against Humanity, which sought to fill some of the substantive and procedural gaps.⁸ In the context of ongoing doctrinal and legislative developments, Dr. Atadjanov's book is both timely and useful—not least, because it is the first comprehensive monograph on the subject written by a Central Asian author for an international audience. The subject of Dr. Atadjanov's book is particularly relevant in Central Asia, since no State in the region has, so far, implemented crimes against humanity in a domestic penal law. Neither have these crimes been criminalised elsewhere in the Commonwealth of Independent States (CIS).

After the general introduction in Chap. 1, the author in the next chapter introduces “humanity” from linguistic, historical, ethical and philosophical perspectives, as a multifaceted concept indeed, one, which is fundamental to the very human civilisation (although authors like Toynbee or Huntington might disagree with the idea of a single human civilisation). He traces the concept back to the Martens Clause and suggests, helpfully, a working definition of the “laws of humanity” (which, notably, Martens himself failed to do when he proposed his catch-all Clause): ““Laws of humanity” represent unwritten and non-fixed rules (or considerations) of an active goodwill towards fellow human beings, which recognize the inherent humanity (i.e., human status) in them” (Sect. 2.1.2). I find this

³ Cf. Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter (the latter did not single out “religious grounds” for the commission of crimes against humanity).

⁴ Article II(1)(c) of the Control Council Law No. 10 did not contain any nexus to an armed conflict.

⁵ Cf. Article 5 of the ICTY Statute (provided for prosecution for the commission of crimes against humanity in international or internal armed conflicts).

⁶ Cf. Article 3 of the ICTR Statute (provided for prosecution for crimes against humanity “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”).

⁷ Article 7(1)(k) of the ICC Statute establishes criminal responsibility for “[other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health]”. Although I do accept the practical utility of such an open-ended provision, it is still not sufficiently specific as a rule of international criminal law.

⁸ Sadat L (2011) *Forging a Convention for Crimes against Humanity*. Cambridge University Press, Cambridge.

definition accurate, precisely because it explains the laws of humanity as “unwritten and non-fixed” rules (or considerations) which are therefore capable of adapting themselves to evolving circumstances and new challenges as well as to various cultural traditions of the world. This approach is reminiscent of Schachter’s classic idea of “human dignity as a normative concept”⁹ in that it pours an essentially philosophical notion in a vessel of legality, and thus makes it usable by (international) lawyers. Also, importantly, the proposed definition seeks to fill a conceptual gap in international law, which has been in existence for just over a century.¹⁰ As the author notes in Sect. 2.1.2, the proposed definition is “rather subjective” but was Martens’ idea of the “laws of humanity” not equally subjective? It most certainly was indeed, it was very *personal* (like many useful ideas are), and Dr. Atadjanov’s subjective (and therefore personal) attempt to explain it, at least, for the purpose of the book is most certainly appropriate. The proposed definitions of “fundamental standards of humanity” as “an irreducible core of non-derogable humanitarian norms and human rights to be respected at all times and in all situations”, and of “humanitarian considerations” (Sect. 2.1.3), appear equally convincing.

Chapter 3 builds upon the preceding chapter’s interdisciplinary foundation, and places “humanity” in the context of international law and, more specifically, of crimes against humanity. Helpfully, the author applies the “law in history” method, which essentially consist[s] in a study of law or a legal concept within its broader context (political, cultural, social, economical, phenomenological, etc.) (Sect. 3.1). This chapter offers an illuminating tour through leading ideas, which influenced the evolution of the concept of humanity, from the ancient world to present days. Here, like in other chapters, the wealth of doctrinal sources amazes: the author studies not only Western but also non-Western ideas of humanity, and engages with them in a critical way. A comprehensive account is thus turned into a thoughtful analysis. In the latter part of the chapter, Dr. Atadjanov shows how the ideas (and ideals) of humanity were integrated in early sources of modern international law such as the Lieber Code, the Martens Clause, the 1915 Declaration by France, Great Britain and Russia, and peace treaties concluded after World War I and hence, how ways were paved for clothing those ideas in the garments of law, particularly international criminal law, after World War II. The comprehensive chapter is summed up in an elegant conclusion (Sect. 3.4):

[T]he history of the idea is not the history of the word. Many significant factors have contributed to the development of the considerations of humanity pertinent to the evolution of legal theories. Those factors go beyond purely theoretical or conceptual definitions and include: realities of life and politics in any given society, in addition to legal developments, individual influences including philosophical contributions, social factors, globalization and international developments. This contextual aspect must always be kept in mind when trying to understand the nature of the concept of humanity [...]

⁹ See Schachter O (1983) Human Dignity as a Normative Concept AJIL 77:848–854.

¹⁰ Cf. the 8th preambular paragraph to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and the 8th preambular paragraph of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.

Chapter 4 elaborates on the concept of humanity in the context of leading theories of crimes against humanity. Here, the central questions are (1) how crimes against humanity should be understood, and (2) what exactly justifies prosecutions for crimes against humanity (cf. Sect. 4.2). These related factors are central to the understanding of crimes against humanity as a normative concept, for humanity is shown as a protected value (*Rechtsgut*) attacking which turns an act into a threat to international peace and security (Sect. 4.3 and Chap. 5). The author shows convincingly that crimes against humanity may be ascribed to State and non-State actors alike (Sect. 4.2.3.2), and that crimes against humanity are usually crimes committed by identifiable groups against other identifiable civilian groups (Sect. 4.2.3.3). On the basis of the foregoing, Dr. Atadjanov proposes what he calls “a theory of humanity as “humanness, or human status””, the central theory of his book from which an understanding of crimes against humanity results as follows:

The commission of these acts eventually aims at rendering their victims “inhuman”, in the sense of depriving them of that very status. All parts of this status come under attack:

- (1) the victims’ individual freedom is denied;
- (2) they are deprived of their human dignity;
- (3) the civilized attitude is negated removing the link between the victims and mankind;
- (4) the sentiment of active good will, or humaneness, ceases to exist by the commission of inhumane acts, and
- (5) the victims’ human nature in the form of reason is denied as well since those acts do not allow them the status of reasonable creatures anymore.

In Chap. 5, the author asserts “humanity” as a valid protected interest under the *Rechtsguttheorie*. The chapter offers an excellent account of this theory’s key aspects and functions (Sect. 5.2) and its alternatives (Sect. 5.3), and applies the theory to the book’s central normative construct—crimes against humanity. The chapter’s chief question is “whether or not humanity a.k.a. humanness represents a fully valid legal interest, i.e., *Rechtsgut* as such” (Sect. 5.5). If legal goods, as interpreted by the author, are “(1) conditions or (2) purposes (3) that are necessary for (4) the free development of the individual(-s), (5) the realization of his/her fundamental rights, as well as (6) the functioning of a state system based on these objectives” (Sect. 5.5.1.1), the question should certainly be answered in the affirmative. Crimes against humanity are massive and grave criminal violations of fundamental human rights, and the modern system of international criminal justice, which was established in 1945 and has been evolving, slowly but surely, ever since, *inter alia*, serves the purpose of protecting identifiable civilian groups against such criminal assaults. In line with this, Dr. Atadjanov concludes in Sect. 5.6:

[T]he concept of humanity as a valid *Rechtsgut* satisfies both the critical (limiting) function as well as the methodological function of the doctrine. It does so because, first, it represents a legitimate legal interest which needs to be protected by criminal law whose main task is to ensure a peaceful co-existence of members of the society and without the humanity such co-existence does not seem plausible. Second, it may not be considered as a simply abstract object of protection but rather as a more global value, as are international peace and human rights, of ICL and law of crimes against humanity; thinking otherwise would compromise the whole value-based foundation of ICL.

In Chap. 6, Dr. Atadjanov offers a useful comparative analysis of legal interests protected, respectively, by the concept of crimes against humanity and other crimes under international law. In practice, specific acts sometimes constitute more than one crime under international law, which require separate qualifications. Methodologically, setting the legal interest protected by the concept of crimes against humanity apart from those attacked by other crimes under international law is an appropriate approach, for by showing what crimes against humanity *are*, at the same time, one shows what they are *not*. In other words, as Dr. Atadjanov puts it, identifying the specific legal interest protected by the concept of crimes against humanity, through the lens of the theory of humanness put forward by the author, contributes “to a better understanding of genocide, war crimes and the crime of aggression” (Sect. 6.1). In the author’s opinion (cf. Sect. 6.5), the relationship between crimes against humanity, on the one hand, and other “core” crimes under international law is as follows:

[A]ll core crimes have one common *Rechtsgut* which is the protection of international peace and security. They do so either in an indirect manner – by ensuring first the other unique values, as is the case with genocide, war crimes and crimes against humanity, or directly, in a literal way which is typical for the crime of aggression. But it is not the only common protected category. The other one includes a range of individual rights which encompass the right to life, dignity, bodily integrity, freedom, prohibition of torture, etc. The determination of the precise right covered by the protection depends on the material elements and protected interests of the individual acts constituting the core crimes.

Indeed, what sets crimes against humanity apart from other crimes under international law is the very *human nature* of victims of such crimes. This nature is common to all mankind, despite all objective—racial, religious, cultural, and other—differences among members of the protected groups, and consists in all individuals’ equal dignity and freedom, whose objective and measurable manifestations include non-discrimination, absence of threats to life, psychological and physical health, personal security, freedom of movement, residence, and work. Certainly, specific ways of implementing these rights and freedoms are conditioned by cultural features of a given society, and the realisation of specific rights in different societies may vary. However, no cultural variations may ever justify (or even reasonably explain) *mass* (widespread or systematic) deprivations of fundamental rights—and crimes against humanity are exactly such acts: the purpose of crimes against humanity consists in degrading victims’ human nature, in turning them from subjects with conscience, will and freedom of choice to outlawed objects, in “showing” the “sub-humanity” of the target groups. In this regard, an alternative formula—for example, “crimes against the civilian population”—would probably be more precise and accurate from the point of view of legal technique but it would certainly lack the emotional force and ethical substance of “crimes against humanity”. Be it as it may, the term “crimes against humanity” is by now recognised and firmly established, and the matter is not about replacing it with a new term but about interpreting the concept of “humanity” agreeably, which Dr. Atadjanov did very convincingly in his book.

As I am recalling that amiable conversation in December 2013, it appears to me that my friend Rustam, the future Dr. Atadjanov, was probably *destined* to write a book on the notion of humanity in ICL. As a fluent speaker of several Central Asian and European languages and an international lawyer trained in Uzbekistan, the United States and Germany, he was certainly qualified, as a professional, to deal with a complex subject, which required academic rigour and mastery of international academic literature on ICL. But writing a book on the concept of *humanity* takes more than just *professionalism*: one has to be *human* and *humane*—and one could not get these qualities only from formal education, or even from working at the International Committee of the Red Cross (although most ICRC staff I know *are* people with truly humanitarian hearts and minds). I assume, these essential features resulted from Rustam’s love for our Pale Blue Dot¹¹ as an amateur astronomer and paleontologist, his love for beauty, arts and music, and from his being a loving family man with two amazing children. Indeed, good international lawyers are made by their hard work and attention to detail but exceptional international lawyers are made by their love for the world, their innate idealism and sense of beauty, and love for human beings (and animals, for that matter). And now, having finished reading the manuscript of Dr. Atadjanov’s excellent book, I am grateful for the depth of his reflection as an academic (for he made me reflect together with him), and for his attention to detail and clarity of argumentation as a lawyer (for the book could not be more convincing, to my professional taste). Yet, above all, I am grateful to Rustam for filling the book with his own personality—fair, curious, hard-working and meticulous. Now, there is more work to be done. This book is not the end—just another beginning.

Almaty, Kazakhstan
October 2018

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¹¹ See Sagan C (1994) *Pale Blue Dot: A Vision of the Human Future in Space*. Random House, New York.

Preface

After the adoption of the Nuremberg Charter in 1945, crimes against humanity came to be positively established in international law. Together with genocide, war crimes and the crime of aggression, crimes against humanity represent “classical” core crimes under international law. They are perhaps the most commonly known type of crimes which is often used for labeling mass atrocities almost every time when there is news those have occurred, in big part due to the enormous emotional resonance that the phrase “crimes against humanity” causes. Furthermore, their historical development, practical application, material and mental elements, scope, role in international (criminal) law, pertinent jurisdiction and other aspects have already been a subject of both general and detailed analysis. The domestic and especially international jurisprudence has included numerous cases on counts of crimes against humanity. However, what remains unclarified in law is their exact protective scope. In other words, the fundamental notion of “humanity” attacked by crimes against humanity has not been considered in a holistic or detailed manner; there is no definition for it in positive law.

This book aims at filling in that gap by tracing comprehensively the evolution of the concept of humanity in international law as well as studying in detail the existing legal theories of crimes against humanity. In analysing the historical developments, the book tries to take into account various factors going beyond purely legal ones which affected or were affected by the conceptual understandings of “humanity” since ancient times. A new useful classification of the existing plentiful doctrinal accounts of crimes against humanity is offered; those are divided into two major types—conceptual and normative. The book then lays out its own theory based on an inclusive view of “humanity”. Combining both conceptual and normative aspects, the proposed theory purports to provide responses to two critical questions: “What is humanity?” and “Why crimes against it must be criminalised?” The respective answers are, first, that “humanity” is to be understood as “humaneness” or “human status” and second, that, crimes against humanity should be criminalized precisely because humanness constitutes their valid protected interest.

Furthermore, the book offers an analysis of the German doctrine of *Rechtsgut* in order to justify the penalization of these crimes at both domestic and international level drawing upon the doctrine's contractualist view of the social contract system. Finally, it also provides a first-ever comparative analysis of the protective scopes of crimes against humanity and other core crimes under international law.

The author hopes that the book would turn out useful for different audiences, theorists and practitioners alike. It aims at providing students and instructors of international law and international criminal law with a scholarly analytical tool which takes stock of various legal, philosophical, historical and other ramifications of the protective scope of one of the most horrific types of international crimes. Moreover, the book is also intended to serve as a helpful academic source for jurists who deal with crimes against humanity law in their practice, by offering a developed theoretical framework addressing a big "white spot" in contemporary international criminal law.

Tashkent, Uzbekistan
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Rustam Atadjanov

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I would like to take this occasion to thank sincerely the representatives of the Albrecht Mendelssohn Bartholdy Graduate School of Law (AMBSL) at the University of Hamburg's Faculty of Law for their understanding and patience shown with regard to my frequent questions and requests during the three-year

scholarship period at the University, in particular Prof. Tilman Repgen and Prof. Hans Heinrich Trute. I am appreciative for their deep knowledge and pedagogical wisdom they shared during the memorable discussions at the AMBSL lectures and seminars including on the issues of the *Rechtsphilosophie* und *Rechtsgeschichte* as well as on various aspects of German law relevant to the book.

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It goes without saying that any possible omissions in the book are totally my responsibility. I will be available for reader's comments and suggestions for future editions via the following email address: rustamatadjanov1@gmail.com.

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About the Author

Rustam Atadjanov, LLB, LLM, Dr. jur. is a Graduate of the Karakalpak State University, Uzbekistan (2003), University of Connecticut School of Law, USA (2006), with the main focus on International Human Rights Law, and University of Hamburg, Germany (2018), focusing on International Criminal Law and crimes against humanity. Formerly a Legal Adviser at the Regional Delegation of the International Committee of the Red Cross (ICRC) in Central Asia (2007–2014) dealing with International Humanitarian Law and Public International Law issues. He authored a small book on the role of individuals in International Law and the United Nations human rights protection system in 2013. Rustam actively publishes with a number of European and Asian academic periodicals writing on a range of topics in the area of International Law and Criminal Law.

Abbreviations

CCL	Control Council Law №10
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
ETSCP	East Timor’s Serious Crimes Panel
HRL	Human Rights Law
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights of 1966
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
ISIL	Islamic State
LoAC	Law of Armed Conflict
NGO	Non-Governmental Organization
Rome Statute	Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra-Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties of 1969